

BETWEEN:

Ontario Human Rights Commission,
Pamela Desroches

- and -

The Corporation of the Town of Midland, and
The Midland Parking Authority; W.G. Lewis, Chairman,
Janet Harvey, Member; Rodney Barlow, Member;
Gerry Morrison, Secretary; and James W. Westcott
and Associates Ltd., and John A. Machry, Senior
Associate.

DECISION AND ORDER

Board of Inquiry: Professor Katherine de Jong

Appearances: Ontario Human Rights Commission (Commission)
Ms. Twohig, Counsel

The Corporation of the Town of Midland, and
The Midland Parking Authority; W. G. Lewis,
Janet Harvey, Rodney Barlow, and Gerry
Morrison

Mr. Philip D. Isbister, Q.C., Counsel

Dr. Machry
Mr. D. P. Warren, Counsel

James W. Westcott & Associates Ltd.
Ms. A. Rae, Counsel

Hearings: October 21, 22, 23, 1987 at Barrie; written
arguments received by January 12, 1988

I was appointed as a Board of Inquiry in this matter by a letter dated September 4, 1987. The parties agree that I have jurisdiction in this matter.

The Complaints

The complainant, Pamela Desroches, was employed by the Respondent Town of Midland Parking Authority from October 22, 1979, until she was laid off on May 21, 1982, beginning as a Meter Attendant and progressing to a Traffic By-Law Officer, Class II. On May 27, 1982 Pamela Desroches filed a formal complaint with the Ontario Human Rights Commission alleging discrimination in employment because of sex. (Complaint #50-7745) The 1982 Complaint was settled by a Memorandum of Agreement, dated May 27, 1983 (exhibit #7) (referred to by counsel as Minutes of Settlement).

In September 1983 the complainant was invited to apply for a position with the Respondent Parking Authority as a Traffic By-Law Officer. The Parking Authority interviewed the complainant as well as several other candidates. It then contracted with the Respondent James Westcott and Associates Ltd. to "conduct a consulting service for the Municipality to assist in determining which of several applicants for the position of traffic by-law officer is the most qualified and also to give us your recommendation as to who should be employed". (exhibit #29) The Respondent John Machry, Senior Associate of James Westcott and

Associates Ltd., carried out the psychological testing and interviewing of the candidates, and prepared the recommendation on behalf of James Westcott and Associates Ltd. Pamela Desroches was not offered the position as Traffic By-Law Officer.

Ms. Desroches, by an Amended Complaint (#50-9527) dated June 29, 1987 asserts: that the Corporation of the Town of Midland and the Midland Parking Authority breached the Settlement set out in the Memorandum of Agreement (exhibit #7) by failing to hire her, contrary to s. 42 of the Ontario Human Rights Code 1981; that the hiring process and the failure to hire her constituted a reprisal contrary to sections 7 and 8 of the Ontario Human Rights Code 1981; that the respondents James Westcott and Associates Ltd. and John Machry infringed her rights under sections 4(1), 8, and 22(2) of the Ontario Human Rights Code, 1981, by asking her questions about her family status during an interview, and by requiring her to complete psychological tests containing questions related to handicap.

At the conclusion of oral argument I invited counsel to submit written argument on the issue of psychological test questions and the effect of s. 22(2) of the Ontario Human Rights Code. After setting out the facts, I will deal separately with each complaint. The relief requested by counsel for the Commission will be dealt with in light of my disposition of each complaint.

Findings of Fact

It is useful to begin with the text of the Memorandum of Agreement between Pamela Desroches and The Corporation of the Town of Midland dated May 27, 1983:

1. It is agreed that should a position become available as a Traffic Bylaw Officer, First Class or Second Class, the Midland Parking Authority will advertise the position in accordance with its normal practices and with the requirements of any collective agreement to which it is a party. The Midland Parking Authority agrees that if Pamela Desroches has an interest in such a position, it will receive and consider her application with no element of discrimination and with the benefit of its knowledge as to her effective performance when previously employed by the Parking Authority. Furthermore, the Midland Parking Authority states that in such circumstances it will offer such a position to Pamela Desroches on probation in accordance with any collective agreement to which it is a party, providing that such an offer of employment is not prohibited by any provision of any such collective agreement and further providing that no application is made by a candidate who is more qualified than Pamela Desroches.

2. Pamela Desroches states that it is now her belief that the actions taken by the Midland Parking Authority, which are detailed in her complaint no. 50-7745, were not in any way taken in such a manner as to deliberately or wilfully discriminate against her in employment on the basis of sex.

3. The Midland Parking Authority agrees to provide to Pamela Desroches a positive letter of reference, a copy of which is attached to this Memorandum of Agreement.

4. The Corporation of the Town of Midland agrees to hold a seminar for its management and supervisory staff. The seminar, of three hours in length, will be conducted by staff of the Ontario Human Rights Commission and will be on the subject of Human Rights in Employment.

The text of the letter of reference, dated June 8, 1983 states:

TO WHOM IT MAY CONCERN:

This letter recommends to you for employment, Mrs. Pamela Desroches, presently of Midland Ontario.

Mrs. Desroches was employed by the Midland Parking Authority as a Part-Time Traffic By-law Officer working approximately 24 hours per week from October, 1979 until May, 1982. During her term of employment her duties were as follows:

- 1) Enforcing parking by-laws;
- 2) Attendance at Court;
- 3) Processing revenue - meters, transit;
- 4) Other related duties, as requested.

During her term of employment she performed her duties satisfactorily and was found to be punctual and honest in the handling of money.

I attach no significance to the fact that this is the second letter of reference, supplied by the Parking Authority after complaints by Pamela Desroches about the adequacy of the first letter. Both letters indicate satisfactory performance of her duties and honesty in handling money. The second letter contains more detail than the first with respect to the duties carried out by the complainant.

Before, during, and after the time when Pamela Desroches was employed by the Midland Parking Authority, the Authority employed a Mr. Henderson as a Traffic By-Law Officer on a full-time basis. I find as a fact that Pamela Desroches believed that a position would "become available as a Traffic By-Law Officer" upon the retirement of Mr. Henderson. It appears that Mr. Henderson was eligible (at age 65) for retirement in October 1982. Mr. Henderson retired effective November 30, 1983. Counsel for the

Commission argued that Mr. Henderson's retirement was postponed until November 1983 to ensure that the position of Traffic By-Law Officer would not become available during the currency of the complainant's recall rights under the collective agreement with the Town of Midland.

No evidence was presented to show why Mr. Henderson chose to retire in 1983 rather than in 1982, and Mr. Henderson was not called as a witness. In the absence of such evidence I attribute no significance to the fact that Mr. Henderson retired in 1983 rather than in 1982.

By letter dated September 21, 1983 (exhibit #9) signed by Mr. Morrison, Treasurer and Secretary of the Midland Parking Authority, Ms. Desroches was informed of Mr. Henderson's retirement and invited to apply for the position of Traffic By-Law Officer I. Enclosed was a copy of the job posting "posted internally as of September 21, 1983". The last paragraph of this posting stated: "Please apply in complete confidence ... by Tuesday, September 27th 1983 by 5:00 p.m.".

Ms. Desroches responded by letter of application dated September 26, 1983, containing a résumé and a letter from Georgian College setting out the grades achieved in courses she had successfully completed in the Accounting Clerk program.

Advertisements for the position were placed in two local newspapers and one special publication entitled "Municipal World". The application deadlines contained in the advertisements were October 31, 1983 and November 11, 1983 (exhibit #27). Counsel for the Commission argued that the Parking Authority treated Ms. Desroches as an 'internal' employee rather than as an 'outside' candidate. (Argument pp. 5-6). As such, it was argued that Ms. Desroches was entitled to be considered for the position before any external candidates were considered.

I find as a fact that Ms. Desroches' seniority status under the collective agreement expired on May 21, 1983 (exhibit #5 article 11.04(d)). On the basis of the evidence of Mr. Lewis, Chairman of the Parking Authority, whom I find to be a credible witness, I find that the members of the Parking Authority believed the Authority was obliged under the collective agreement to advertise the position internally for 5 days before the position was advertised to the public. (Lewis cr.-ex. p. 24, 5-20). This procedure was followed. (exhibit #38) It appears that no applications were received from members of the bargaining unit. I find that the members of the Parking Authority believed that Pamela Desroches "should be informed of the job as quickly as possible" (Lewis cr-ex. p. 25, 23-25), but that no conscious decision was taken whether to treat her as an internal or external candidate. In order to inform Ms. Desroches of the

opening as quickly as possible, the internal job posting was included for her information in the letter of September 21, 1983 (exhibit #9). I conclude from the facts that the Parking Authority did not intend to treat Ms. Desroches as an 'internal' candidate, and that it did not intend to give Ms. Desroches a shorter deadline than that given to other external candidates. On the facts, the application deadlines had no impact on Ms. Desroches' application for the position, or on the consideration of her application by the Parking Authority.

The argument of counsel for the Commission that the Memorandum of Agreement dated May 27, 1983 (exhibit #7) gave Ms. Desroches "seniority status" or 'internal' status is not supported by the facts.

By a form letter dated October 7, 1983 (exhibit #11) Mr. Morrison notified Ms. Desroches that she would be contacted by telephone by November 18, 1983, if she was selected to be interviewed for the position. Pamela Desroches was interviewed for the position on November 23, 1983, by the Respondents Morrison, Harvey, Barlow and Lewis (Desroches, In Ch. p. 26, l. 20). The interview lasted approximately 10 to 15 minutes. When asked by Ms. Twohig whether she was asked any questions about her organizational ability or experience, Ms. Desroches replied "They had knowledge of that and no they didn't ask anything about that" (Desroches, In ch. p. 37, l. 10). From the evidence presented, I

find that the interview of Ms. Desroches conducted on November 23, 1983 by the members of the Parking Authority was reasonable, and in light of their knowledge of Ms. Desroches' "effective performance" in the position, adequate to enable them to determine Ms. Desroches' qualifications for the position.

The Parking Authority received 57 applications. Eight applicants were interviewed by the Parking Authority. (Lewis, In Ch. p. 9, l. 10-25) At the conclusion of the interview process, each member of the Parking Authority ranked the candidates on a piece of paper. They each ranked the same candidate as #1. This candidate was not Pamela Desroches. I rely for these facts on the testimony of Mr. Barlow, whom I find to be a credible witness. (Barlow, In ch. p. 4, l. 15).

I find as a fact that the members of the Parking Authority were aware of their obligations to Pamela Desroches under the Memorandum of Agreement (exhibit #7) and that they did not wish to infringe the Ontario Human Rights Code, (exhibit #28). Mr. Barlow suggested that a consultant be hired to assist them in making their final selection. Mr. Haig, the solicitor for the Town of Midland, was instructed to select and retain a consultant. (Lewis In. Ch. p. 10). James Westcott and Associates Ltd. was selected.

The Minutes of the Meeting of the Parking Authority dated December 13, 1983 record that the consultant was to report on 8 applicants. (exhibit 28) In fact, for financial reasons, the consultant reported on only 4 candidates, including Pamela Desroches and the successful candidate.

By letter dated December 22, 1983 from Douglas G. Haig, Q.C. solicitor for The Midland Parking Authority to James W. Westcott & Associates it was confirmed that James W. Westcott & Associates would act on behalf of The Corporation of the Town of Midland "to conduct a consulting service for the Municipality to assist in determining which of several applicants for the position of traffic by-law officer (was) the most qualified and also to give (their) recommendation as to whom should be employed" (exhibit 29)

James W. Westcott & Associates Ltd. agreed to act on behalf of the Corporation of the Town of Midland and/or The Midland Parking Authority and referred the matter to Dr. Machry to carry out the assignment.

After due consideration of the job description and the list of required skills and responsibilities prepared by The Midland Parking Authority with respect to the position of Traffic By-Law Officer I, Dr. Machry selected and arranged for the

administration of a battery of three tests to each of the four applicants. The three tests were:

- Otis-Lennon Mental Ability Test, by Authur S. Otis and Roger T. Lennon;
- California Psychological Inventory by Harrison G. Gough, Ph.D. and
- Screening Questionnaire AB, James W. Westcott & Associates Ltd.

The 'job description' supplied to Dr. Machry contained the same information as the 'internal job posting' and the newspaper advertisements. The list of required skills and responsibilities supplied (exhibit #24) to Dr. Machry read as follows:

1. PUBLIC RELATIONS

Neat, clean and well groomed.

Friendly, outgoing personality.

Capability to use discretion, where necessary.

Genuine enjoyment in meeting and dealing with the public.

Capability to handle the irate public or any unpleasant situation effectively, with finesse as well as to deal positively with downtown merchants.

Awareness that the By-Law Enforcement Officer should be a "Goodwill Ambassador" in Midland's downtown core.

2. ORGANIZATIONAL SKILLS

Should be self-starter as supervision is minimal.

Ability to organize workload into daily, bi-weekly, weekly, etc. schedules.

Ability to keep neat, accurate records, were required.

Willing to work with and take direction from Secretary of the Midland Parking Authority.

Ability to organize and maintain an orderly workshop including inventory of necessary parts, etc.

3. MECHANICAL SKILLS

Should have sufficient background in mechanics to repair and maintain meters and any other parking devices so that they are in good working order at all times.

4. Willingness to carry out Parking Authority policy in a positive and constructive way.

It was the evidence of Mr. Lewis that this document had been created by the members of the Parking Authority to describe the attributes which a candidate would need if that candidate were to carry out the duties of a Traffic By-Law Officer in the way in which the members of the Parking Authority wished to see those duties carried out. It was also the evidence of Mr. Lewis, that with the retirement of Mr. Henderson, the Parking Authority realized that it had an opportunity "to change the image of the Parking Authority to enhance the image of the town, and to really run a parking system the way we thought it should be run ..."

(Lewis, In-Ch. p. 11, line 30) There is no evidence as to the date on which the job description (exhibit #24) was created. On the evidence available to me, I find that exhibit #24 was created by and for the use of the members of the Parking Authority to assist them in choosing a Traffic By-Law Officer.

The evidence of Mr. Lewis, which I accept, is that the members of the Parking Authority rated public relations skills as the most important qualification for the position, with organizational and mechanical skills next in order of priority. These criteria were used by Dr. Machry in his assessment of the candidates, "weighing most heavily the ability to take initiative, to develop goodwill in the community, to handle people effectively and to use discretionary judgment in carrying out the task of giving tickets." (exhibit #31).

In early January, 1984, Ms. Desroches attended at the Midland Townhall to complete two of the three psychological tests selected by Dr. Machry (and administered to the four final candidates). The two tests were administered by a clerical employee of the Town of Midland. They were the "California Psychological Inventory" (exhibit #13) and the "Screening Questionnaire AB, James W. Westcott & Associates" (exhibit #12). I find that these tests were properly administered, and I attach no significance to the fact that these tests were not personally administered by Dr. Machry. On January 16, 1984, the "Otis-Lennon Metal Ability Test" (exhibit #14) was administered to Ms. Desroches. Dr. Machry also interviewed Ms. Desroches on that day. It is not clear from the evidence whether the candidates were tested first and interviewed second, or vice-versa, or whether the order differed for each candidate. In my opinion,

the order of testing and interviewing is not relevant to the disposition of Ms. Desroches' complaint.

In paragraph 27 of the Complaint (exhibit #1) Ms. Desroches asserts that during his interview of her, Dr. Machry asked her how many children she had, in contravention of sections 4, 8, 22(2) of the Ontario Human Rights Code. I find as a fact that this information was disclosed in the interview. The evidence of Dr. Machry was that this evidence was disclosed voluntarily. The evidence of Ms. Desroches was that Dr. Machry asked her directly about her family. Having had the benefit of observing both Dr. Machry and Ms. Desroches, and having examined a copy of Dr. Machry's notes of the interview, I prefer the evidence of Dr. Machry on this point. Counsel for the Commission sought to discredit Dr. Machry's testimony by demonstrating that his system of note-taking (whether he always and only wrote "she/he says" beside information which was volunteered) was not always consistent. Although Dr. Machry could not say he was always consistent in his method of note taking with respect to notes taken during the interviews of the other three candidates, I am satisfied with his explanation as to the significance of the notation "she says" beside the information relating to family status contained in Dr. Machry's notes of his interview of Ms. Desroches. I find as a fact that Dr. Machry did not ask Ms. Desroches about her family status, and I find that Mrs. Desroches volunteered this information in response to an open-ended

question from Dr. Machry. Dr. Machry gave evidence that he found Ms. Desroches to be "a very honest, open, straight forward person". I have no doubt that Mrs. Desroches believed, in retrospect, that Dr. Machry asked her about her family. I have no difficulty believing that Ms. Desroches, quite openly, volunteered information about her family.

Dr. Machry sent his recommendation and assessments of each candidate to Mr. Morrison on January 19, 1984 (exhibit #31). The covering letter stated: "The final ranking was, therefore based on our evaluation of the interview, and accompanying documents (those written by the applicants and particularly the results of the standardized tests administered)" (exhibit #31).

I am convinced from the evidence that Dr. Machry conducted his consultation services in accordance with the standards of his profession, particularly those outlined in the Ontario Board of Examiners in Psychology Standards of Professional Conduct (exhibit #37). I find that the interview was conducted with professional integrity, both with respect to its length, and to the questions asked. I find that Dr. Machry selected the three psychological tests through the proper exercise of his professional competence. I find that Dr. Machry's recommendations were based entirely on information obtained from the interviews, the applications, and the test results. I find that Dr. Machry was at no time motivated by any bias against Ms.

Desroches, and that he discharged his consulting duties objectively.

On January 27, 1984 the Parking Authority passed a motion that "the position of Traffic By-Law Officer I be award to ---- as per James W. Westcott & Associates Ltd. Consultant's report" (exhibit #32). Counsel for the Commission sought to show that the Parking Authority failed to properly consider the consultant's report and that it simply adopted Dr. Machry's recommendations, thereby attempting to abdicate responsibility for the decision. Under the Memorandum of Agreement (exhibit #7) the Parking Authority was obliged to offer the position to Ms. Desroches "providing no application is made by a candidate who is more qualified than Pamela Desroches". Clearly, the Parking Authority is responsible for its decision to hire someone other than Ms. Desroches, whether or not its decision was based upon the recommendations of a professional consultant. I find that the Parking Authority based its decision to hire someone other than Ms. Desroches on both its own interview of the successful candidate, and on the recommendation of Dr. Machry. Dr. Machry ranked as "most suitable" the same candidate who was unanimously ranked "#1" by the Parking Authority at the completion of its interviews.

Ms. Desroches was advised on February 1, 1984, that she was not the successful candidate.

The Arguments

1. Breach of the Memorandum of Agreement

The Parking Authority was obligated to hire Ms. Desroches for the position "... providing that no application is made by a candidate who is more qualified than Pamela Desroches." The words "more qualified" refer to the attributes and skills required, in the opinion of the Parking Authority, for a person to perform the duties of the position in the way in which the Parking Authority wished to see those duties performed. The Parking Authority ranked public relations skills as their number one priority. They were entitled to do so. I am satisfied on the evidence that public relations skills are a bone fide occupational qualification for the position. Organizational skills and mechanical skills were ranked as a necessary but secondary priority. Both Pamela Desroches and the successful candidate had the necessary organizational and mechanical skills to perform the duties of the position. It appears from the evidence that the successful candidate had more experience than Ms. Desroches. The successful candidate had 3 years of full-time experience with parking enforcement and supervisory duties in a comparable sized Ontario town, while Ms. Desroches had 2½ years of part-time experience.

In written argument, counsel for the Commission argued that the Parking Authority breached the Memorandum of Agreement in

that it failed to consider Ms. Desroches' "effective performance" of the job, and that "rather it adopted the report of Dr. Machry, knowing that he did not have the benefit of its knowledge of Ms. Desroches' previous job performance." (Argument para 44, 45) As noted above, I find as a fact that the Parking Authority did not rely solely on the recommendation of Dr. Machry in not hiring Ms. Desroches, and that it considered Ms. Desroches' previous effective performance. This disposes of the argument that the Parking Authority was not entitled to rely on Dr. Machry's standard of "more suitable" as opposed to "more qualified" candidates (Argument para. 46). Ms. Twohig further submitted that Ms. Desroches was judged on her inherent qualities rather than her qualifications (Argument para 47). In view of the fact that public relations skills were an essential qualification for the position, I find no merit in this argument.

Finally, counsel for the Commission argued that the Memorandum of Agreement gave Ms. Desroches rights analogous to those of a "seniority" status under a collective agreement (Argument, para 49-55). I do not accept this interpretation of the Memorandum of Agreement. In my view, it is important to enforce settlements made under the Human Rights Code in order to ensure that the remedies established by the Code are actually enjoyed by complainants whose rights may have been infringed. In this case, the Memorandum of Agreement required the Parking Authority to hire Ms. Desroches, taking her effective performance

into account, unless a more qualified person applied. The Parking Authority was entitled under the Memorandum of Agreement to hire a more qualified person than Ms. Desroches. From the evidence before me, and with the benefit of having observed Ms. Desroches as a witness, I am persuaded that the Parking Authority did not breach the Memorandum of Agreement in not hiring Ms. Desroches.

2. Reprisal

Ms. Desroches alleges in her Complaint (exhibit #1, para. 35) that through their recruitment, selection and hiring process and decisions, the Parking Authority has taken reprisal against her for having previously instituted proceedings under the Human Rights Code. On the facts, it is my opinion that the Parking Authority was motivated throughout the recruitment and hiring process by a desire to hire the most qualified person possible for the position of Traffic By-Law Officer I. In my opinion, the members of the Parking Authority initially ranked the successful candidate at #1 because of her qualifications, not because of any element of reprisal against Ms. Desroches. Similarly, I find that the decision to retain James W. Westcott & Associates Ltd. was taken to ensure that a person other than Ms. Desroches would only be hired if that person was more qualified than Ms. Desroches. In other words, a consultant was used to ensure that the Memorandum of Agreement would not be breached, and to ensure

that no element of reprisal could be present in the hiring decision.

Dr. Machry, acting objectively and in accordance with the standards of his profession, confirmed the Parking Authority's initial ranking of the successful candidate as #1 for the job. In my opinion, no reprisal was taken by any of the Respondents against Ms. Desroches.

Before turning to the next complaint, I wish to deal with an allegation made by Ms. Desroches that she was told that if she made a complaint, she wouldn't be hired by the Town of Midland. The evidence of Ms. Desroches is as follows:

Q: Did you do that?

A: Well I was called into Gerry's office the next day and the Clerk of the Town at that time told me in front of Gerry "have you brought a complaint against this town?" And I said, "Not as yet", and he said "If you do, you'll never work for this town or any other."

Q: Who was it that said that?

A: It was Mike Owens, the Clerk of the Town. Gerry appeared shocked at the time, but ...

Q: Did he say anything?

A: No he didn't. He just looked stunned.

Q: Was there anything further said in that ...

A: No.

(Desroches p. 35, c. 10-24) The "Gerry" referred to is the Respondent Mr. Morrison. From the evidence, it is clear that none of the respondents made this statement, and that none of them adopted the statement as their own.

3. Interview Questions relating to family status

I have found as a fact that Dr. Machry did not ask any questions relating to family status during his interview of Ms. Desroches, and hence Dr. Machry did not infringe Ms. Desroches' rights under sections 4, 8, 22(2) of the Code.

4. Psychological tests and Questions relating to handicap

Ms. Desroches alleges that the psychological tests contained questions relating to handicap in contravention to her rights under sections 4, 8, 22(2) of the Code. (exhibit #1 para. 22) Counsel for the Commission, in written argument, narrowed the complaint to questions contained in the James W. Westcott & Associates Ltd; "Screening Questionnaire AB" (exhibit #12) (Submissions para. 30).

This complaint is made against the respondents James W. Westcott and Associates and Dr. Machry. These tests were selected by Dr. Machry in the exercise of his professional expertise, under a consulting contract with the Town of Midland. In my opinion, neither the Town of Midland nor the Parking Authority nor the individual respondents are responsible for the fact that these tests were chosen to be administered to the candidates by Dr. Machry.

In requiring Ms. Desroches to complete the "Screening Questionnaire", Dr. Machry was making a written inquiry of "an applicant" within the meaning of s. 22(2) of the Code. Although Dr. Machry was not acting as an employer or agent of an employer to receive an application from Ms. Desroches, he was making a written inquiry of her in her capacity as applicant for employment with respect to the position for which Dr. Machry was acting as a consultant. Hence, s. 22(2) applies to Dr. Machry's administration of the "Screening Questionnaire" to Ms. Desroches.

Dr. Machry gave uncontested evidence that the questions on the "Screening Questionnaire" are scored by use of a template, with no attention being paid to the answers to individual questions. Two scales are produced from the "Screening Questionnaire", 'A' and 'B'. These scales are compared to each other, and it is the relationship of the A and B scales which is used in interpreting the test results. (Machry, p. 32-33) The "Screening Questionnaire" is the private property of James W. Westcott & Associates Ltd. and some police forces. I accept the evidence of Dr. Machry that this test has been validated by James W. Westcott & Associates Ltd., although the validation study is not in the public domain.

It appears from the evidence, that one of the functions of the "Screening Questionnaire" is to produce comparative measures of how people cope with anxiety. These scores are derived from

the questions relating to physical health which are the subject of this complaint. The questions alleged to directly or indirectly classify or indicate qualifications by handicap are as follows:

- 3. I am often sick to my stomach.
- 7. I have very few headaches
- 15. I frequently notice my hand shakes when I try to do something.
- 18. I blush as often as others.
- 19. I have diarrhea once a month or so.
- 24. My hands and feet are usually warm enough.
- 25. I sweat very easily even on cool days.
- 29. I practically never blush.
- 32. I do not often notice my heart pounding and am seldom short of breath.
- 34. I feel hungry almost all the time.
- 35. I am very seldom troubled by constipation.
- 36. I blush no more often than others.
- 39. I have a great deal of stomach trouble.
- 43. My sleep is restless and disturbed.

Section 8 of the Code defines "handicap" as:

- (i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device,
- (ii) a condition of mental retardation or impairment,
- (iii) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (iv) a mental disorder, or
- (v) an injury or disability for which benefits were claimed or received under the Worker's Compensation Act;

In my opinion, taken at face value, none of these questions "classify" or indicate qualifications by "handicap". Furthermore, the "Screening Questionnaire" is not interpreted by reference to the specific answer of true or false to these questions. It is interpreted according to the relative number of true and false answers given with respect to each scale. In my opinion, the complaint's rights under sections 4, 8, 22(2) of the Code have not been infringed by Dr. Machry or by James W. Westcott & Associates Ltd. through the administration of psychological tests to Ms. Desroches.

At the conclusion of oral argument I invited written submissions with respect to the issue of the impact of the Code on psychological testing. This is a difficult issue which does not appear to have been addressed in any reported decision. As I understand the argument made on behalf of the Commission, the Commission wishes to ensure that job candidates are not excluded from employment on the basis of any ground prohibited by the Code, through the tendency of a psychological test to exclude people on such grounds. There was no allegation and no evidence before me in this case that any of the psychological tests administered to Ms. Desroches tended to exclude her or anyone else from employment on any ground prohibited by the Code. As a result, I find that this is not an appropriate case in which to grant the order requested on behalf of the Commission "requiring the employer to notify the Human Rights Commission prior to using

written aptitude or personality tests and to provide the commission evidence of validation regarding human rights if requested to do so".

Conclusion

For the reasons stated, all claims for relief against The Corporation of the Town of Midland, and The Midland Parking Authority: W. G. Lewis, Janet Harvey, Rodney Barlow, Gerry Morrison, James W. Westcott and Associates Ltd., and John A. Machry are dismissed.

Katherine de Jong

Katherine de Jong
BOARD OF INQUIRY

February 10, 1988

